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COVID-19 government enforcement and investigation priorities: Minimizing your business risk

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The 2019 novel coronavirus (COVID-19) pandemic has changed our day-to-day routines and forced us to navigate many unique challenges in our personal and business lives. One challenge many businesses are facing is how to operate within the confines of the pandemic while complying with federal rules and regulations, both those that are well-established and those that have been promulgated to address specific needs brought on by COVID-19. While the pandemic has also affected the U.S. Department of Justice (DOJ) and other agency enforcement offices, there is no sign that government investigations into wrongdoing will decline. In some cases, government authorities are increasing their efforts to protect the public.

In this environment, it is important that businesses ensure operations are in accordance with DOJ and agency guidance so their actions do not trigger a government investigation. While some steps businesses can take to minimize the likelihood of an investigation were commonplace prior to the pandemic, others require a better understanding of specific guidance promulgated by DOJ and other agencies in the wake of COVID-19.

DOJ prioritization of exploitation cases

The DOJ has taken clear steps to establish prioritization of investigations during the pandemic and will be focusing on exploitation cases and other COVID-19-related fraud schemes.

In March 2020, Attorney General William Barr directed all U.S. Attorneys to prioritize the investigation of these fraud schemes. Common schemes include:

1. Individuals and business selling fake COVID-19 cures
2. Phishing emails from entities posing as being associated with the World Health Organization or the U.S. Centers for Disease Control and Prevention
3. Malicious websites or apps appearing to share COVID-19-related information to gain and lock access to devices until payment is secured
4. Illegitimate or non-existent charitable organizations seeking donations
5. Fraudulent billing by medical providers obtaining patient information for COVID-19 testing and then billing for other tests and procedures

To further that directive, the Attorney General's Office also instructed each U.S. Attorney to appoint a Coronavirus Fraud Coordinator (Coordinator) for his or her judicial district. This Coordinator is to serve as legal counsel for his or her district on COVID-19 matters, direct the prosecution of COVID-19-related crimes, and conduct outreach and awareness initiatives regarding common forms of fraudulent schemes that seek to wrongly take advantage of needs and conditions resulting from the pandemic. The Coordinators in the Eastern District of Wisconsin and Western District of Wisconsin are Assistant U.S. Attorneys Kelly Watzka and Chadwick Elgersma, respectively.

DOJ is actively investigating and prosecuting wrongdoing during pandemic

Watzka, Elgersma and their colleagues at the various U.S. Attorneys' Offices across the nation are encouraging the public to report fraud and other schemes resulting from the pandemic. Many U.S. Attorneys are contacting health care facilities for leads on potential schemes involving hoarding personal protective equipment and warning and advising the public on scams related to COVID-19 Economic Impact Payments. Additional measures include teaming with the American Association of Retired Persons (AARP) and other organizations to disseminate information to the public.

Since late March 2020, enforcement actions have been filed against providers and nonmedical personnel for promoting fake COVID-19 treatment. Charges have also been filed against those attempting to sell fake personal protective equipment to the U.S. Department of Veterans Affairs, attempting to smuggle mislabeled drugs into the U.S. to treat COVID-19, making false statements regarding accumulation and sale of personal protective equipment, and soliciting investments in a company fraudulently claiming funds would be used to market COVID-19 treatments and cures. Further, the DOJ estimates federal authorities have disrupted hundreds of internet domains that were used to exploit the pandemic to commit fraud and other crimes.

Reduce your risk of allegations of fraud or misuse of government funds

While the cases above involve particularly egregious cases of fraud, it is important to remember that we are in the early months of COVID-19 relief programs and pursuit of COVID-19-related investigations. As the government continues to provide various aid packages to individuals and businesses alike, it will be important for all businesses, and especially those receiving federal funds, to take action to ensure compliance with the law relating to those funds in order to prevent future investigations. It is likely future investigations would be for less flagrant corporate actions.

Initiatives such as the White House's National Emergency Declaration, which devotes $50 billion to containing the pandemic, and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which includes a $2 trillion dollar stimulus package, will help relieve some of the financial stress impacting businesses. However, with these initiatives comes rules and regulations to ensure that the funds are used as intended.

The CARES Act also created a Special Inspector General for Pandemic Recovery (SIGPR) to "conduct, supervise, and coordinate audits and investigations" of the CARES Act's financial assistance programs and any other U.S. Department of the Treasury programs established under the CARES Act. In so doing, the SIGPR will be meticulously monitoring those businesses that have received assistance under the CARES Act to prevent and detect fraud and abuse, and to facilitate the identification and prosecution of participants of fraud and abuse.

With these initiatives comes special concern for investigations, charges and enforcement actions under the False Claims Act (FCA).[1] The FCA is the primary civil enforcement tool used by the DOJ to pursue those who fraudulently obtain relief money, and fraudulently bill under contracts with the government. The government's employment of the FCA is likely to expand as small businesses and large corporations alike receive federal funds under the CARES Act, and enter contracts to meet the increased need for emergency goods and services.

Businesses of all sizes and operating in all industries should therefore take additional steps beyond their standard practices to limit the potential for allegations of fraud or misuse of government funds. These steps should not only reinforce pre-pandemic workplace compliance and internal governance standards, but should also involve a system for maintaining documentation and preservation of relief-related correspondence, documents and actions. Importantly, no business should ignore or loosen any of their internal governance procedures or any laws, rules or regulations in the name of expediency.

Other federal and state agency enforcement policies during COVID-19

Beyond DOJ, several federal and state government agencies have issued policy statements regarding their enforcement priorities and activities during the pandemic.

[1]Learn more about the FCA and COVID-19 through our recent article entitled Managing and mitigating the risk of qui tam actions in the wake of COVID-19

U.S. Securities and Exchange Commission

Unlike some agencies that have publicized their willingness to be flexible and considerate of the unique circumstances in exercising their enforcement authority, the Securities and Exchange Commission (SEC) has maintained that its enforcement division is fully operational and that it will be vigilant against threats targeting "Main Street" investors.

In its public statements, the SEC has emphasized the importance of maintaining market integrity and following corporate controls. Its recent enforcement activities have focused on fraud schemes and other illegal activity arising from the COVID-19 emergency. It has issued trading suspensions for a number of stocks, many for companies that purported to offer health products or services related to COVID-19. Additionally, the agency has cautioned about "fraudulent stock promotions, unregistered offerings, phony charitable investments, affinity fraud, and fake products offering high returns."

Investment scams come in a variety of flavors suited to COVID-19. For example, investment in underfunded or fraudulent companies that supposedly make products or services related to COVID-19 prevention or treatment, alternative investments claiming to not be vulnerable to ongoing market risk, or investments purporting to offer unrealistic returns by taking advantage of the market volatility or low prices. In Wisconsin, the Department of Financial Institutions has specifically called out the threat of COVID-19-related charity scams.

In addition to investment scams, the SEC has warned about an increased potential for insider trading owing to a greater number of people who may have access to nonpublic information. The enforcement division has released a statement reminding directors, officers and employees of their obligations to keep nonpublic information confidential and to comply with insider trading laws. The statement likewise urged public companies to adhere to their established disclosure controls, codes of ethics and other regulatory obligations.

The SEC is also encouraging consultation with its staff to ensure that financial reporting standards are maintained, demonstrating enhanced focus on these issues, and may not be forgiving of regulatory lapses where consultation with the SEC was not undertaken. However, the SEC has stated that it is not looking to second-guess good faith attempts to provide investors and other market participants appropriately-framed, forward-looking information.

U.S. Department of Health and Human Services

In the wake of extraordinary efforts by health care providers to combat the COVID-19 pandemic, including through enhanced and novel collaborations among different entities, the U.S. Department of Health and Human Services (HHS) has issued blanket waivers with respect to the Stark Law, which generally prohibits providers from referring Medicaid or Medicare patients to entities with which they have a financial relationship. The blanket waivers permit such referrals for 18 specifically designated relationships, such as referrals by owners of physician-owned hospitals or owners of ambulatory surgery centers that temporarily convert to hospitals. The relationship must be related to the COVID-19 emergency (which is broadly defined) and must not raise concerns regarding fraud or abuse. The blanket waivers are retroactive to March 1, 2020.

Subsequently, in an April 3, 2020, policy statement, HHS's Office of the Inspector General (OIG) announced that it will similarly relax enforcement of the Anti-Kickback Statute in relation to certain remuneration related to COVID-19. The Anti-Kickback Statute generally prohibits providing or receiving remuneration in exchange for patient referrals. The purpose of the OIG's temporary policy is to afford flexibility to providers of health care services who may be unable to comply with technical aspects of the Anti-Kickback Statute. The policy permits providers to pursue certain financial relationships that would otherwise be prohibited, such as payments made by a facility or physician for space or equipment rental below fair market value, the purchase of items or services below fair market value, or payments to physicians that are above their normal contracted rate.

Importantly, while the Anti-Kickback Statute policy is based on the Stark Law blanket waivers, it is notably narrower than the blanket waivers, covering only certain of the 18 enumerated categories provided for in the blanket waivers. All other arrangements prohibited by the Anti-Kickback Statute are unaffected by this policy. Moreover, the Anti-Kickback Statute policy applies only prospectively to conduct occurring on April 3, 2020, and later. Like the blanket waivers, to

qualify for the Anti-Kickback Statute policy conduct must be related to care provided in connection with COVID-19, must not create a risk of fraud or abuse, and must be adequately documented.

While these HHS policies show the agency's willingness to accommodate the special needs of health care providers, the policies are complex and warrant careful review to determine how they may apply to your organization or practice.

U.S. Environmental Protection Agency

After early reports suggesting that the U.S. Environmental Protection Agency (EPA) was significantly curtailing enforcement efforts, the agency has since issued a more detailed temporary policy.

Under the Temporary COVID-19 Enforcement Policy, the EPA will not seek penalties for noncompliance with routine monitoring and reporting requirements, if, on a case-by-case basis, the EPA agrees that such noncompliance was caused by COVID-19. The same policy applies to administrative settlement agreements: the EPA will not seek penalties for noncompliance with basic reporting requirements provided such failure was occasioned by COVID-19. Businesses should continue to use notice provisions set forth in agreements to keep the EPA apprised of their compliance efforts.

Regulated parties must document the basis for a claim that the pandemic prevented it from conducting the routine monitoring and reporting. These case-by-case determinations will be made after the pandemic is over and the EPA reserves its right to disagree that any asserted noncompliance was caused by the pandemic.

The temporary policy does not excuse exceedances of pollutant limitations in permits, regulations or statues due to COVID-19. Regulated entities are expected to comply. The temporary policy does not affect businesses' responsibility to prevent and respond to spills or releases, or to criminal violations. However, the temporary policy contemplates that the EPA's response to compliance will be determined in light of the circumstances created by the public health emergency, provided that the facility contacts the EPA or their state agency as soon as possible.

Businesses that may encounter challenges complying with environmental laws and regulations as a result of COVID-19, due to workforce or resource issues, for example, should review the temporary policy carefully to determine whether it may apply.

As usual, states maintain parallel authority to enforce many environmental laws, and any exemptions allowed by the EPA may not be respected by state agencies. The Wisconsin Department of Natural Resources (DNR), in particular, has issued its own process for case-by-case determinations of flexibility from regulatory burdens. Regulated entities are encouraged to work with their DNR contact to discuss compliance assistance if COVID-19 justifies the assistance sought.